No. 88-1496

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

THE CITY OF CHICAGO, ET AL.,

Petitioners,

v.

LAWRENCE C. BIENEMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Seventh Circuit erred in reading this Court's decision in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), as creating a "proprietorship exception" allowing the imposition of damages under state tort law against airport proprietors for failure to regulate noise caused by aircraft flying in conformance with federal law and procedures.

2. Whether the United States Court of Appeals for the Seventh Circuit erred in finding, contrary to decisions of this Court, that state law damage claims directed at noise caused by aircraft in flight do not impose an intolerable burden on interstate commerce.

PARTIES TO THE PROCEEDINGS BELOW

Plaintiff in the District Court and appellant in No. 88-2399 was Lawrence C. Bieneman, on his own behalf and on behalf of all persons similarly situated.

Defendants in the District court and appellees in No. 88-2399 were: The City of Chicago; Eugene Sawyer, in his official capacity as Acting Mayor of the City of Chicago; Howard Stanback, in his offical capacity as Commissioner of the Department of Aviation of the City of Chicago; American Airlines, Inc.; Delta Airlines, Inc.; Northwest Airlines, Inc.; Ozark Airlines, Inc.; Trans World Airlines, Inc.; United Airlines, Inc.; and, USAirlines, Inc.

The City, Mayor Eugene Sawyer and Commissioner Howard Stanback are Petitioners here. Plaintiff Bieneman and each of Defendant Airlines listed above are Respondents.

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No. _____

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October Term, 1988

THE CITY OF CHICAGO, ET AL.,

Petitioners,

v.

LAWRENCE C. BIENEMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The City of Chicago (the "City"), through its Counsel, petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 864 F.2d 463 (App. 1). The District Court's order dismissing Bieneman's state law claims against the City on grounds of federal preemption is reported at 662 F.Supp. 1297 (App. 24). The

prior District Court order dismissing Bieneman's claims under 42 U.S.C. § 1983 is unreported (App. 35).

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was rendered on December 13, 1988. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

49 U.S.C. §1508(a). The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent high seas, bays and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. The aircraft of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.

49 U.S.C. §1301(29). "Navigable airspace" means air space above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety and take-off and landing of aircraft.

49 U.S.C. §1305(a) –

Preemption – (1) except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

U.S. Const., Art. VI, cl.2. This Constitution, and the Laws of the United States shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Art. I, §8, cl.3. The Congress shall have power –

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

STATEMENT OF CASE

Petitioner, the City, owns, controls, operates and is proprietor of O'Hare International Airport ("O'Hare") situated in Cook and DuPage Counties, Illinois. O'Hare is one of the busiest airports in the world. Respondent's complaint alleged that O'Hare serves over 667,000 flights

per year, with the number of flights projected to rise to over 1 million by 1995.[1]

Respondent Lawrence C. Bieneman ("Bieneman") is a property owner in suburban Bensenville, DuPage County, Illinois. He filed an eight-count amended complaint (the "Complaint") against the City, its Mayor and Commissioner of Aviation and various airline carriers serving O'Hare, alleging deprivations of property without due process, the taking of property under the 5th and 14th Amendments to the United States Constitution, along with state tort claims for nuisance, assault and battery. The Complaint sought certification of Bieneman as the representative of a class of similarly situated persons under F.R.C.P. 23.

The Complaint made no allegations that O'Hare was operated in violation of the Federal Aviation Act (the "Act"), 49 U.S.C. §1301 *et seq.*, or federal regulations. Rather, Bieneman's state tort claims were premised on allegations that:

> 20. Defendant City of Chicago has caused and continues to cause numerous jet-powered aircraft to be operated, piloted and propelled at low altitudes through the airspace over or adjacent to Plaintiffs' property and repeatedly at all hours of every day and night (Counts IV and V).

and that:

> 21. These operations of airplanes to, from, and around the airport owned, operated, and controlled by Defendant City of Chicago, have impacted and continue to impact Plaintiffs and their property with

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[1] As the Complaint was dismissed on a motion to dismiss, Respondent's allegations are taken as true for purposes of this petition.

> excessive levels of noise and vibration, and inundate Plaintiffs with toxic air pollution (Counts IV and V).

The Complaint alleged that these acts had caused Bieneman both personal and property damage.

The City moved to dismiss Bieneman's state claims, *inter alia*, on grounds of federal preemption, and also moved to dismiss Bieneman's other claims. In two separately issued opinions, the District Court granted Defendants' motion, dismissing Bieneman's claims against all Defendants with prejudice.

The United States Court of Appeals for the Seventh Circuit affirmed the District Court's dismissal of Bieneman's constitutional claims and affirmed its refusal to certify a class action. However, the Seventh Circuit vacated the District Court's determination that Bieneman's state tort claims against the City were preempted in light of this Court's decision in *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973) ("*Burbank*"). The Seventh Circuit ruled that the Act does not expressly preempt state damage remedies. It noted that the Act included a savings clause, 49 U.S.C. §1506, on which this Court had relied in permitting state damage remedies for an airline's misrepresentation in selling tickets in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), and that state courts freely awarded damages in air crash cases.

Next, the Seventh Circuit found that *Burbank* left room for state regulation of airport noise when the state or municipality was the proprietor of an airport stating:

> Whether Illinois should allow its courts some role in setting noise levels at O'Hare is the state's business. The federal role is limited to defining the power of

> the state as an entity. Given the recognition in *Burbank*, that the state may govern the operation of airports it owns, the conclusion in *Luedtke* [*v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975)] that every conceivable role for state courts has been preempted is untenable.

Finally, the Seventh Circuit ruled, relying on this Court's decision in *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984), that the mere fact that a pervasive scheme of federal regulation exists does not, by itself, lead to preemption of state damage remedies. In ruling that state damage remedies were not preempted, the court overruled its earlier decision in *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975).

As no federal grounds for jurisdiction remained, the Seventh Circuit ordered the District Court to dismiss Bieneman's state claims without prejudice so that they may be refiled in state court.

REASONS FOR GRANTING THE PETITION

I. The United States Court of Appeals for the Seventh Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

Air travel is an increasingly dominant and critical mode of transportation. The number of flights is increasing, as is the need for larger and more efficient airports. To promote the nation's economy and the convenience of its citizens, a highly interrelated national air transportation system has developed. The nation's growing dependence on air travel has brought with it heightened

concern for air safety and has made it essential that there be a uniform and orderly system for regulating aviation.

With jet travel comes noise and with such noise come attempts by state and local governments and by individuals such as Bieneman to limit noise. To the extent such state and local measures pertain to noise from planes in flight, however, they run afoul of the federal regulatory scheme and of considerations of interstate commerce. As this Court recognized in *Burbank:*

> "The aircraft and its noise are indivisible. . . .To exclude the aircraft noise from the Town is to exclude aircraft."

Burbank at 628 (*quoting American Airlines v. Town of Hempstead,* 272 F. Supp. 226, 230 (E.D.N.Y.), *aff'd.,* 398 F.2d 369 (2d Cir.), *cert. denied,* 393 U.S. 1017 (1968)). *Burbank* recognized that an "intensive and exclusive" system of federal control of air transportation had evolved to best preserve efficient and safe air travel. *Id.* at 633 (*quoting Northwest Airlines, Inc. v. Minnesota,* 322 U.S. 292, 303 (1944) (Jackson, J., concurring)).

In *Burbank,* the regulated airport was not owned by the municipality. Therefore, the municipality was not acting as a proprietor. Because *Burbank* addressed a situation where a municipality was not a proprietor, this Court did not need to address the limits on state or local governments' ability to regulate airport noise when acting as airport proprietors. Therefore, this Court took pains to stress in footnote 14 of *Burbank:*

> We do not consider here what limits, if any, apply to a municipality as a proprietor.

411 U.S. at 636 n.14.

In recent years, however, several courts, including the Seventh Circuit below and three state Supreme Courts, have misread this Court's express and unequivocal statement that it was *not ruling* on this issue to instead have been an affirmative ruling by this Court that the limits of *Burbank do not apply* to a state or municipality acting as an airport proprietor. Thus, the Seventh Circuit stated:

> The Supreme Court distinguished in *Burbank* between the state's role as a regulator and its role as a proprietor of airports, observing that it was not questioning the ability of a governmental body to determine how it would run its own airports. (App. 19)

As a result of this misreading, the Seventh Circuit assumed that an airport proprietor can influence aircraft operations and, accordingly, held that state tort claims based on its failure to do so are not preempted. Thus the Seventh Circuit stated that even where a complaint alleges no violation of any federal law or regulation, an individual can sue under purely state law for noise caused by aircraft "propelled at low altitudes through the airspace adjacent to Plaintiffs' property" or by the "operation of airplanes to, from, and around the airport."[2]

Similarly, the California Supreme Court in 1979 in *Greater Westchester Homeowner's Association v. City of Los Angeles,* 26 Cal. 3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329

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[2] The allegations of the Complaint do not speak to noise by planes on the ground at the airport. This is not a case, as the Seventh Circuit erroneously stated, regarding noise baffles to absorb ground noise at the perimeter of the airport. (App. 22)

(1979), *cert. denied*, 449 U.S. 820 (1980), a case regarding Los Angeles International Airport, the Georgia Supreme Court in 1982 in *Owen v. City of Atlanta*, 248 Ga. 299, 282 S.E.2d 906, *cert. denied*, 456 U.S. 972 (1982), a case regarding Atlanta-Hartsfield Airport, and the Wisconsin Supreme Court in 1983 in *Krueger v. Mitchell*, 112 Wis. 2d 88, 332 N.W.2d 733 (1983), all relied on a purported "proprietorship exception" to *Burbank* in upholding state tort damage remedies for airport noise. This supposed "proprietorship exception" has been used to justify damage claims against several of the nation's busiest and most important airports.

By misinterpreting footnote 14, the Seventh Circuit and other courts which have found a "proprietorship exception" have jeopardized the safe and efficient system of air travel envisioned by the Act and by this Court in *Burbank*. Thus, while it was unnecessary to address the scope of proprietors' rights to regulate noise in 1973 in *Burbank*, it is imperative to do so today.

Far from excepting proprietors from constraints on noise regulation, federal law and decisions of this Court make clear that noise regulation of aircraft in flight is equally offensive to the federal regulatory scheme whether the state or municipality is acting as a regulator or a proprietor or both. As this Court explained in *Burbank:*

> It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption. As Mr. Justice Jackson stated, concurring in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303:
>
> > "Federal control is intensive and exclusive. Planes do not wander about in the sky like

> vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of control."

Burbank at 633-34.

To allow state regulation of aircraft schedules to combat noise, *Burbank* understood, would make it impossible for the FAA to manage a coordinated system of air traffic flow:

> If we were to uphold the Burbank ordinance, and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded.

Id. at 639. *See also* 49 U.S.C. §1508(a) (declaring that navigable airspace belongs to the United States).

Other federal courts construing *Burbank* have made clear that once a plane is in flight, its noise is beyond state regulatory control. *See United States v. City of Blue Ash, Ohio*, 487 F. Supp. 135 (S.D. Ohio 1978), *aff'd.*, 621 F.2d 227 (6th Cir. 1980) (noise abatement procedure designed to reduce noise by mandating specific turns by departing aircraft held preempted); *Air Transport Association of America v. Crotti*, 389 F. Supp. 58, 65 (N.D. Cal. 1975) (three-judge court) ("Regulations of noise levels which occur when an aircraft is in direct flight . . . are a per se unlawful exercise of police power into the exclusive federal domain of control over aircraft flights and

operation, and air space management and utilization in interstate and foreign commerce").

In addition, several state courts have recognized that *Burbank* limits more than merely a state's police power. One court has taken a position directly contrary to *Bieneman*, holding that damages claims based upon noise from planes in-flight are preempted. *Bryski v. City of Chicago*, 148 Ill. App. 3d 556, 499 N.E.2d 162 (2d Dist. 1986) *leave to appeal denied*, 113 Ill.2d 572, 505 N.E.2d 351 (1987). Other courts, while not specifically addressing damage claims, have found that state injunctive remedies are preempted in light of *Burbank*. *Village of Bensenville v. City of Chicago*, 16 Ill. App. 3d 733, 306 N.E. 2d 562 (1st Dist. 1973);[3] *Northwest Phoenix Homeowner's Association v. Scottsdale Mun. Airport*, 636 P.2d 1269 (App. Ct. Ariz. 1981); *Township of Hanover v. Town of Morristown*, 135 N.J.Super. 529, 343 A.2d 792 (App.Ct. 1975).

Moreover, courts of last resort in other states have avoided the issue of constitutional preemption by ruling under state law that actions for inverse condemnation are

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[3] Ironically, while the Seventh Circuit finds that state damage remedies are not preempted and has allowed Bieneman to pursue his remedies in state court, the two Illinois State Appellate Courts with jurisdiction over O'Hare have held that state remedies *are* preempted in light of *Burbank*. *Bryski v. City of Chicago*, 148 Ill. App. 3d 556, 499 N.E. 2d 162 (2d Dist. 1986), *leave to appeal denied*, 113 Ill. 2d 572, 505 N.E.2d 351 (1987) (state damage remedies preempted); *Village of Bensenville v. City of Chicago*, 16 Ill. App. 3d 733, 306 N.E.2d 562 (1st Dist. 1973) (state injunction remedies preempted). Litigants who walk into Illinois State Court in light of the Seventh Circuit's decision in *Bieneman* will be dismissed on grounds of preemption.

the exclusive state remedy for parties aggrieved by airport noise. *See, e.g., Ario v. Metropolitan Airport Comm'n,* 367 N.W.2d 509 (Minn. 1985); *Long v. City of Charlotte,* 306 N.C. 187, 293 S.E.2d 101, 108 (1982); *Henthorn v. City of Oklahoma City,* 453 P.2d 1013 (Okl. 1969); *Thornburg v. Port of Portland,* 376 P.2d 100 (Ore. 1962). *See also Drybread v. City of St. Louis,* 634 S.W.2d 519 (Mo.App. 1982).[4]

The growing recognition of the need to curtail state inhibitions on air travel is also reflected in changes in federal aviation law in the 16 years since *Burbank.* In the 1982 Airport and Airways Improvement Act, 49 U.S.C. §2201 *et seq.,* in providing for metropolitan airport hubs, of which O'Hare Airport is one, Congress declared as its policy that:

> It is in the national interest to develop in metropolitan areas an integrated system of airports designed to provide expeditious access and maximum safety. *Id.* at 2201(10).

and that:

> Artificial restrictions on airport capacity are not in the public interest. *Id.* at § 2201(13).

Moreover, in 1978, Congress expressly preempted state regulation aimed at rates, routes or services:

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[4] Although *Burbank* addressed regulation and not damage claims of the kind at issue here, *Burbank*'s limits on state authority apply equally to indirect state regulation of noise by way of injunction or damage remedies. As the Seventh Circuit acknowledged (App. 20) and this Court recognized in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), a state may not do through judicially-created damage remedies what it could not do through direct regulation.

> (1) except as provided in ¶(2) of this subsection, no State or political subdivision thereof and no interstate agency or political agency of two or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation. 49 U.S.C. §1305(a)(1).

These provisions make certain that federal law leaves no room for state law which forces an airport, out of fear of liability, to reduce the number, type, or timing of aircraft it services.[5] *See O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir. 1989) (finding state tort remedies preempted based upon express preemption provision).

To read *Burbank* as the Seventh Circuit does not only imperils the FAA's regulatory scheme, but also imposes an unfair burden on airport proprietors. As noise from planes in flight is something the proprietor cannot control, it is especially draconian to expose the proprietor to the risk of liability resulting from the noise of aircraft

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[5] The broad reach of federal preemption of in-flight noise is not disturbed, as the Seventh Circuit contended, by the savings clause of the FAA Act, 49 U.S.C. § 1506. That the savings clause has no relevance to the FAA's authority to regulate in-flight aircraft is best evidenced by the fact that *Burbank* struck down state regulation despite the clear presence of § 1506 in the Act. Cases allowing suit for misrepresentation by airlines, *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), or for bodily injuries from air crashes do not speak to the operation of aircraft complying with federal law and are therefore not preempted. They do not justify state regulation of the noise that goes part and parcel with aircraft flight.

flying to, from or around an airport.[6] To say that *Burbank* imposes such a dilemma on airport proprietors misreads *Burbank* and risks the very fractionalized control of air traffic flow and the weakening of FAA authority that *Burbank* found offensive. That this Court has not, but should, settle an important question of federal law constitutes a strong reason for granting review of certiorari. U.S. Sup. Ct. Rule 17.1(c).

II. The United States Court of Appeals for the Seventh Circuit has decided an important question of federal law in a way in direct conflict with applicable decisions of this Court.

The United States Court of Appeals for the Seventh Circuit's decision is in direct conflict with applicable decisions of this Court establishing limits on states' ability to regulate interstate commerce, including air travel. The conflict between the Seventh Circuit and decisions of this Court is an important question governing review on certiorari. U.S. Sup. Ct. R. 17.1(c).

Burbank recognized that, in addition to disrupting the FAA's regulatory scheme, state regulation of in-flight noise imposed an intolerable burden on interstate commerce. The Court cited with approval an FAA statement detailing the risks posed by state noise regulations to interstate commerce:

> The continuing growth of public acceptance of aviation as a major force in passenger transportation and

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[6] Notwithstanding the Seventh Circuit's loose use of language, *see* App. 19-20, the City, not the State, is the proprietor of O'Hare.

> the increasingly significant role of commercial aviation in the nation's economy are acomplishments which cannot be inhibited if the best interest of the public is to be served. It was concluded therefore that the extent of relief from the noise problem which this [curfew] might have achieved would not have compensated the degree of restriction it would have imposed on domestic and foreign air commerce.

411 U.S. at 640 (*quoting* 25 Fed. Reg. 1764-1765).

The awareness in *Burbank* that state noise law could severely constrain the free flow of interstate air transportation intended by Congress reaffirms what this Court has noted in striking down state restraints directed at other modes of interstate transportation as violative of the Commerce Clause. U.S. Const., Art. I, § 8, cl.3. Thus, in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), this Court struck down an Illinois safety regulation prescribing a specific form of protective mud-flap for trucks traveling through the state. This Court noted that Illinois' law conflicted with mud-flap regulations passed by other states and concluded that allowing such a patchwork of incompatible laws would impose an untenable burden on interstate commerce. The Court held:

> Like any local law that conflicts with federal regulatory measures, state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must also bow.

Id. at 529 (citations omitted). *See also Southern Pacific Co. v. State of Arizona*, 325 U.S. 761, 773 (1945) (invalid statute "interposes a substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service"); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662

(1981); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978). Here a web of incompatible state noise restrictions established by jury verdict and enforced by damage awards would unduly burden aviation travel. For instance, jets leaving New York's Kennedy Airport might not be able to fly to Dallas-Fort Worth Airport if they would lead to a greater cumulative noise level than Texas law tolerated. Moreover, the restraints imposed by fear of damage liability may well be more sweeping than those created by the police power ordinance struck down as unconstitutional in *Burbank*.

CONCLUSION

The petition for a Writ of Certiorari should be granted and set down for briefing and argument on the merits. Alternatively, the petition should be granted summarily and the decision of the United States Court of Appeals for the Seventh Circuit denying preemption should be vacated and the case remanded for further consideration in light of *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973) and other decisions of this Court.

Respectfully submitted,

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APPENDIX A

Lawrence C. BIENEMAN,
Plaintiff-Appellant,
v.
CITY OF CHICAGO, et al.,
Defendant-Appellees.
No. 88-2399.
United States Court of Appeals,
Seventh Circuit.
Submitted Nov. 1, 1988.
Decided Dec. 13, 1988.*

Before POSNER, COFFEY and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

Noise from O'Hare Airport is the subject of this case. Lawrence C. Bieneman, who bought a parcel of land near O'Hare in 1967 and has become a frequent filer, commenced this suit as a class action on behalf of all other residents of northern Illinois adversely affected by noise.[1]

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*The case was orally argued on January 6, 1988, but we dismissed the appeal for want of jurisdiction because the judgment was not final. This new appeal, taken from a final judgment, has been submitted to the original panel for decision without a second oral argument.

1. Bieneman became Mayor of Bensenville, Illinois, and that village, joined by three others, filed suit in state court seeking an injunction against the expansion of O'Hare. The villages lost. *Village of Bensenville v. City of Chicago*, 16 Ill.App.3d 733, 306 N.E.2d 562 (1st Dist.1973). Bieneman, as Mayor of Bensenville, was among the signatories to a consent decree affecting planning for growth at O'Hare. *Illinois*

(Continued on following page)

Bieneman contended that the City of Chicago (which operates O'Hare) and the airlines using O'Hare intentionally reduced the value of his land by propagating noise and the chemicals in aircraft exhaust. Two counts of the complaint alleged a deprivation of property without due process, a third alleged a taking, and other counts made claims under state tort law.

Decisions by three district judges have left Beineman empty-handed. Judge Decker dismissed the claims alleging deprivations of property without due process on the ground that entitlements to be free from nuisances and related torts are not "property" within the meaning of the Due Process Clause. Judge Duff, to whom the case was transferred, dismissed the remaining claims. 662 F.Supp. 1297 (N.D.Ill.1987). Any taking occurred no later than 1976, Judge Duff concluded, so that this suit, filed in 1984, is untimely. The state claims presented under the court's pendent jurisdiction all had been preempted by federal statutes and regulations, Judge Duff concluded in reliance on *Luedtke v. County of Milwaukee*, 521 F.2d 387, 391 (7th Cir.1975). Although Judge Duff reserved decision on the complaint's demand to proceed as a class action, 662 F.Supp. at 1298 n. 1, Bieneman filed a notice of appeal. After we dismissed this as premature, 838 F.2d

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ex rel. Scott v. Butterfield, No. 74 C 2440 (N.D.Ill.1974). Bieneman personally was among the plaintiffs in a case challenging the Federal Aviation Administrations's plan of redevelopment at O'Hare – another defeat. *Suburban O'Hare Commission v. Dole*, 787 F.2d 186 (7th Cir.1986). So this case is at least the fourth for Bieneman on the topic.

962 (7th Cir.1988). Bieneman asked the district court to certify a class limited to some of the legal issues in the case. By then the case had been transferred to Judge Leinenweber, who denied the motion. Judge Leinenweber doubted whether Bieneman, who had lost the case on the merits, was an adequate representative of the class; at all events, the judge thought that the prospect of inconsistent decisions on legal questions was insufficient to call for certification of a class, given the disparate interests of the many thousands of persons affected by operations at O'Hare Airport. Bieneman again appeals, this time from a final judgment.

I

Bieneman contests the district court's refusal to certify the case as a class action. Unless the district court abused its discretion, we must respect its decision. *Patterson v. General Motors Corp.*, 631 F.2d 476, 480 (7th Cir.1980); *Adashunas v. Negley*, 626 F.2d 600, 605 (7th Cir.1980); *Susman v. Lincoln American Corp.*, 561 F.2d 86, 90 (7th Cir.1977). There was no abuse. Bieneman's proposed class contained at least 300,000 persons. Some of these undoubtedly derive great benefit from increased operations at O'Hare, which make the area attractive for business and may increase the value of land, even as they make land less attractive for residential purposes. The magnitude of any effect on residential owners depends on topography, flight patterns, and many other variables; homeowners who want to sell to businesses (or are in areas zoned for business) may benefit from extra flights and so oppose homeowners differently situated. No

wonder courts routinely decline to certify classes in airport-noise cases. E.g., *Virginians for Dulles v. Volpe*, 344 F.Supp. 573, 575 (E.D.Va.1972), affirmed in relevant part, 541 F.2d 442 (4th Cir.1976); *Town of East Haven v. Eastern Airlines, Inc.*, 331 F.Supp. 16, 18 (D.Conn.1971), affirmed, 470 F.2d 148 (2d Cir.1972); *Ario v. Metropolitan Airports Comm'n*, 367 N.W.2d 509 (Minn.1985); *City of San Jose v. Superior Court of Santa Clara County*, 12 Cal.3d 447, 115 Cal.Rptr. 797, 525 P.2d 701 (1974).

Conceding this, Bieneman insists that the district court should have certified a class for purposes of legal questions only, such as preemption and the length of the statute of limitations. Such a class could prevent inconsistent outcomes in multifarious cases, achieving the objective of Fed.R.Civ.P. 23(b)(1). Maybe so; some courts have given class treatment to questions of law while reserving issues of fact for individual resolution. *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1196-97 (6th Cir.1988); *In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 166-67 (2d Cir.1987); *In re School Asbestos Litigation*, 789 F.2d 996, 1008-10 (3d Cir.1986). That this *may* be done does not mean that it *must* be. A court does not abuse its discretion in failing to employ novel procedural devices, especially when there are serious doubts about the adequacy of the plaintiff's representation of the class, even about the existence of a case or controversy with regard to a certification of the sort Bieneman proposes. A class limited to legal claims (such as identifying the period of limitations), leaving the class members to file separate suits if they want to take advantage of the ruling, does not resolve any concrete case, and it looks suspiciously like a request for an advisory opinion. (*Sterling, Agent*

Orange, and similar opinions contemplated that questions not covered by the class certification would be resolved by further proceedings in the same case, avoiding this problem.)

Bieneman filed this case as a class action yet pursued it for more than three years without asking the district court to certify a class; he appealed, leaving the class behind, and recovered his zeal to serve as representative only on learning that disposition of the class claim was essential to his own claim. We suggested on the first appeal that "a class representative who has lost on the merits may have a duty to the class to oppose certification, to avoid the preclusive effect of the judgment." 838 F.2d at 964. Bieneman nonetheless pressed on. What he pressed, however, was a motion for partial certification, abaondoning members of the class pleaded in the complaint and many of the issues originally identified for class treatment, in the teeth of our observation that a representative may not unilaterally abandon the class, 838 F.2d at 963. The district court was entitled to doubt that Bieneman is a fit representative of other land owners. See *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 405, 97 S.Ct. 1891, 1897, 52 L.Ed.2d 453 (1977). This is quite enough to support Judge Leinenweber's decision, and we resolve no other questions concerning class certification.

II

Bieneman alleges that noise and noxious gasses emanating from O'Hare Airport deprive him of property without due process of law, and so allow a remedy under

42 U.S.C. § 1983. The contention is fundamentally that O'Hare is a nuisance, traditionally a subject of state law. Judge Decker believed that maintaining a nuisance does not deprive anyone of "liberty or property" within the meaning of the Due Process Clause. The desire to prosecute a nuisance suit is not based on either liberty or property, the judge held in reliance on *Brown v. Brienen*, 722 F.2d 360 (7th Cir.1983), and *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir.1983). As we see things, however, the right question is not whether there is or may be property in a chose in action – to which the answer, if pertinent, is "yes". See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1153, 71 L.Ed.2d 265 (1982). Sending waves of noise across a stranger's land can "take" his property, see *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 96 L.Ed. 1206 (1946), and therefore must be able to "deprive" him of "liberty or property" too. The property interest is in the land, not in the right to litigate. That the state's conduct concerning the land is tortious does not eliminate a liberty or property element that otherwise exists. *Brown*, *Jackson*, and similar cases do not depend on a belief that obnoxious conduct by the state cannot deprive a person of liberty or property. They hold, rather, that the Constitution does not require the state to use civil or criminal process to protect its residents from private aggression or ameliorate the vicissitudes of life. See generally *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir.1988) (en banc).

The state is the aggressor in our case, however. The complaint alleges that state actors manage O'Hare Ariport so as to inflict injury on private persons. This

formally states a constitutional claim. The immediate hurdle for Bieneman, however, is the principle that negligent conduct does not violate the Due Process Clause. *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), and we added in *Archie* that grossly negligent conduct should be treated just like negligence. 847 F.2d at 1218-20. To get anywhere, Bieneman must show that the City of Chicago intentionally or recklessly inflicted injury wothout due process of law. This is so whether he contends that the violation is procedural of substantive.[2]

No one supposes that the City of Chicago set out to aggrevate Mr. Bieneman by jacking up the levels of noise at O'Hare Airport. He is not a member of some prostrate group; owners of land near O'Hare are among the wealthiest and most influential people in Illinois; noise injures without regard to race, religion, and political beliefs. To show "intent" (or at least recklessness), Bieneman maintains that Chicago knows the effect of noise and exhaust gasses, yet does nothing to aid their victims. Put in this way, however, the argument is no different from the one in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). Statutes reserving public jobs for veterans assist a group almost all members of which are male. Women seeking the jobs contended that the state must have "intended" to do them injury, because everyone intends the natural and probable consequences of his acts – and the

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2. Whether there is such an animal as "substantive due process" when the state affects property that it could choose to take outright is a subject we need not pursue. See *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir.1988).

consequences of the preference law were apparent. The Supreme Court took a different view of intent in constitutional law, however, distinguishing knowledge from intent, byproduct from objective. A state may know what its laws do, yet may not "intend" all of the consequences. Some of them may be unwelcome fallout from activities undertaken for another reason. The essential question, as the Court saw things, was whether the state acted "at least in part 'because of,' not merely 'in spite of,' [the] adverse effects upon an identifiable group." 442 U.S. at 279, 99 S.Ct. at 2296.

Chicago intends to operate O'Hare Ariport, knowing that noise and pollution occur. But it does not operate O'Hare because this is the best way to create noise and fumes. These are unwelcome byproducts. A good way to put the intent question is: "If the consequence at issue were smaller, or its effect were reversed, would the actor find the activity less attractive?" If planes made less noise, would Chicago curtail the size and hours of operation of O'Hare? To put the question this way is to show that Bieneman cannot establish intent.

Recklessness is a proxy for intent, and Bieneman fares no better with the claim that Chicago gratuitously subjects him to noise and pollution. He might say that a government acts recklessly toward something if the government accords it no weight – in prison cases, for example, we say the guards act recklessly if they accord the interests of prisoners no weight and so disdain cries of distress. One might ask from this perspective whether the City would operate O'Hare differently if it owned all of the surrounding land. Cf. William F. Baxter & Lillian R. Altree, *Legal Aspects of Airport Noise*, 15 J.L. & Econ. 1

(1972). If Chicago would behave no differently, then it must be holding property owners' interests as dear as its own, the pole away from recklessness. Bieneman's complaint does not allege that the City allows O'Hare to be noisier or dirtier than it would if the government owned the surrounding land, and at oral argument Bieneman's counsel denied that it does. This aspect of the case therefore stands or falls on the proposition to know of an adverse consequence, and to do nothing to palliate things, is to "intend" that consequence. Under *Feeney*, the contention fails.

III

Protests about "deprivations" without due process sound tinny when the state is free to take what it wants – with or without process – so long as it is prepared to pay. A state may take property outright or may condemn an easement for noise, and sometimes under the Constitution it must do so, see *Causby*, although airport noise rarely requires compensation, *Griggs v. Allegheny County*, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962). See also *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 233-41, 17 S.Ct. 581, 583-86, 41 L.Ed. 979 (1897) (applying the Takings Clause of the fifth amendment to the states through the fourteenth). The right step logically is an inverse condemnation action. Bieneman contends that the noise at O'Hare took his land – or at least an easement – no later than 1976, when, Bieneman believes, the din became unbearable. Since this suit was filed eight years later, the defendants insist that it is untimely.

A suit under 42 U.S.C. § 1983 must be filed within the time allowed by state law for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). See also *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987) (same for § 1981). In Illinois that period is two years, although we held in *Anton v. Lehpamer*, 787 F.2d 1141 (7th Cir.1986), that in light of cases before *Garcia* that might have engendered reliance on a longer period, the plaintiff would be allowed two years from the decision in *Garcia* or five years from the time the claim accrued, whichever is shorter. Bieneman contends that Chicago took his property in 1976, so under *Anton* he had until 1981 to file a § 1983 action. Bieneman attempts to avoid that outcome by insisting that the takings claim rests on the Constitution rather than § 1983. The district court disagreed, holding that constitutional inverse condemnation suits against state actors depend on § 1983. 662 F.Supp. at 1299-1300. We know from *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 2386 n. 9, 96 L.Ed.2d 250 (1987), that takings suits may be filed directly under the Constitution. It follows, Bieneman contends that we should use as the limitations period the most analogous period drawn from state law – which, he submits, is the 20-year time allowed to bring adverse possession actions, a period applied to inverse condemnation suits against governmental units. E.g., *Rosenthal v. City of Crystal Lake*, 171 Ill.App.3d 428, 121 Ill.Dec. 869, 525 N.E.2d 1176 (2d Dist.1988); *DiSanto v. City of Warrenville*, 59 Ill.App.3d 931, 17 Ill.Dec. 289, 376 N.E.2d 288 (2d Dist.1978).

The line of argument works only if three things hold: first, that state rather than federal law supplies the period of limitations for a claim arising directly under the Constitution; second, that the period for adverse possession is the most analogous period of state law; third, that the existence of a claim directly under the Constitution cancels the holding of *Garcia* that the period of limitations applicable to personal injuries governs all constitutional torts, even though state law might use different periods for different wrongs. Each is questionable. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, ___ U.S. ___, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987), which applied a four-year period from anti-trust law to suits under a different federal statute that did not contain its own period of limitations, shows that the custom of recurring to state law for periods of limitations is not the same as a rule requiring their absorption. See also *DelCostello v. Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) (applying the six-month period from the National Labor Relations Act to "hybrid" contract-duty of fair representation cases); *In Data Access Systems Securities Litigation*, 843 F.2d 1537 (3d Cir.1988) (en banc) (applying the three-year period contained in federal securities laws to implied federal rights of action); *Smith v. City of Chicago*, 769 F.2d 408 (7th Cir.1985) (applying a six-month period derived from federal employment laws to actions enforcing rights under a federal consent decree). An appropriate benchmark for this purpose might be the six years provided by 28 U.S.C. § 2401(a) for suits against the United States, a period that is employed to mark the outer limits for purposes of inverse condemnation actions under the Tucker Act, 28 U.S.C. § 1491(a)(1). *United States*

v. 422,978 Square Feet of Land, 445 F.2d 1180, 1187-89 (9th Cir.1971); *Stubbs v. United States*, 620 F.2d 775, 784 (10th Cir.1980); cf. *Kabua v. United States*, 546 F.2d 381, 383 (Ct.Cl.1976). If this six-year period were applied, Bieneman still would be out of court.[3] And Chicago contests the submission that if state law supplies a period of limitations, the 20-year adverse possession rule is the most closely analogous. We shall go no further along either path, however, for the third condition cannot be satisfied.

Garcia and *Goodman*, which established the periods of limitations applicable under § 1983 and § 1981, resolved two questions: *where* to get the period of limitations, and *which* period to use. The answer to the first of these questions, based on 42 U.S.C. § 1988, was "state law". Section 1988 does not apply to a case in which the Constitution rather than a civil rights statute supplies the remedy, although the Rules of Decision Act, 28 U.S.C. § 1652, might have the same effect for other federal litigation. The second question has two parts: (a) shall there be a single period of limitations for all §§ 1981 and 1983 cases, or should different periods be used for different patterns (some analogized to contracts, some to intentional torts,

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3. The 12-year period in the Quiet Title Act, 28 U.S.C. § 2409a(f), might be an alternative benchmark, but this statute applies only when the government claims an interest in land. See *United States v. Mottaz*, 476 U.S. 834, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986); *Block v. North Dakota*, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983). The point of Bieneman's suit is that the government *dis*claims an interest in his land but ought to be forced to pay for it anyway, the classic inverse condemnation action.

some to negligent torts, some left to the catch-all statute)?, and (b) if one period is to be used, which? *Garcia* and *Goodman* concluded that only one period should be borrowed from state law, the one generally applicable to personal injuries.[4]

These decisions – whether to have a single period, and which period to use – do not depend on § 1988. Nothing in the text or history of that ststute speaks to the questions. The Court had to devise its own rule, and it made a practical choice for compelling reasons:

> The experience of the courts that have predicated their choice of the correct statute of limitations on an analysis of the particluar facts of each claim demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983. Almost every § 1983 claim can be favorably analogized to more than one of the ancient commonlaw forms of action, each of which may be governed by a different statute of limitations. . . . If the choice of the statute of limitations were to depend upon the particular facts or the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each § 1983 claim. . . . The simplicity of the admonition in § 1988 [to use state law] is consistent with the assumption that Congress intended the identification of the appropriate statute of limitations to be an uncomplicated task for the judges, lawyers, and litigants, rather than a source of uncertainty, and

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4. The Court has heard oral argument in *Okure v. Owens*, 816 F.2d 45 (2d Cir.1987), cert. granted, ___ U.S. ___, 108 S.Ct. 1218, 99 L.Ed.2d 419 (1988), which presents the question whether a different rule should apply when the state has a special period of limitations for intentional torts. This complication need not detain us.

> unproductive and ever increasing litigation. Moreover, the legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters.

Garcia, 471 U.S. at 272-75, 105 S.Ct. at 1944-47 (footnotes omitted). See also *Agency Holding*, 107 S.Ct. at 2763-64.

These considerations apply with equal force to claims invoking the Constitution directly. Actions under § 1983 and those under the principal fount of direct suits, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), are identical save for the replacement of a state actor (§ 1983) by a federal actor (*Bivens*). No wonder the only two courts of appeals that have addressed questions concerning limitations under *Bivens* have held that the rules used for § 1983 suits will be applied in full force to *Bivens* cases. *Chin v. Bowen*, 833 F.2d 21, 23-24 (2d Cir.1987); *McSurely v. Hutchison*, 823 F.2d 1002, 1004-05 (6th Cir.1987). When the defendant is a state actor, § 1983 and direct litigation may be interchangeable, the choice between them adventitious. There is no reason to have a different period of limitations, and a strong reason not to: any difference would give the plaintiff an incentive to pick whichever jurisdiction provided the longer period, recreating the uncertainty that the Supreme Court sought to eliminate. We conclude, therefore, that there should be a single period of limitations for all suits in which the Constitution supplies the remedy.

Harmonizing the "direct" suit with the § 1983 suit requires us to go the rest of the way with *Wilson v. Garcia*.

The Supreme Court applied the period for personal injuries to all § 1983 cases, recognizing that § 1983 covers many wrongs that states, for domestic purposes, would classify under different statutes. To avoid enervating litigation, the period for direct actions must be the same as the period for § 1983 actions. So pleading this case as a claim directly under the Takings Clause leaves Bieneman exactly where pleading it under § 1983 would have left him: with five years from the wrong, or two years from *Wilson*, whichever is less, to file the complaint. Bieneman missed the time by three years, and the district court properly granted summary judgment for the defendants.

IV

There remain questions of Illinois law, laid under the pendent jurisdiction. "[I]f the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). The district court did not dismiss them but resolved them on the merits – adversely to Bieneman. The court did not give a reason for doing so or recognize that there might be a problem in disposing of state questions after the basis of federal jurisdiction evaporated.

The dictum given unqualified in *Gibbs* has been qualified in practice. See *Rosado v. Wyman*, 397 U.S. 397, 404-05, 90 S.Ct. 1207, 1213-14, 25 L.Ed.2d 442 (1970). Although this court regularly directs district judges to remit pendent state claims to state court after wrapping up the federal issues before trial, e.g., *Baltimore Orioles*,

Inc. v. Major League Baseball Players' Ass'n, 805 F.2d 663, 682 (7th Cir.1986), we recognize that courts sometimes ought to dispose of everything at once, that prompt resolution may be dramatically more efficient, justifying the displacement of state questions to the federal tribunal. See *Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936, 945-46 (7th Cir.1988) (collecting cases). The failings in the federal issues may carry over to the state claims. *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1178 (7th Cir.1987). Or there might be a federal defense to the state claims, one appropriately resolved by a federal court. *Graf v. Elgin, Joliet & Eastern Ry.*, 790 F.2d 1341, 1345-48 (7th Cir.1986). Our case is of this kind. The defendants contended, and the district court held in reliance on *Luedtke*, that federal law preempts any claims otherwise available under state law. 662 F.Supp. at 1300-01. Bieneman recognizes that *Luedtke* governs and asks us to overrule it, which a state court could not do. *Gibbs* permits a federal court to proceed in such a case.

Luedtke offered this analysis, which we quote in full: "Since the federal laws and regulations have preempted local control of aircraft flights, *Burbank [v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973)], the defendants may not, to the extent they comply with such federal laws and regulations, be charged with negligence or creating a nuisance. Similarly, § 114.04 of the Wisconsin Statutes cannot be invoked to make unlawful flights which are in accordance with federal laws and regulations. . . . To the extent that the County may be violating the federal laws or regulations, the plaintiffs should . . . exhaust their administrative remedies." 521 F.2d at 391. Since *Luedtke* every court that

has examined the question independently has come to the opposite conclusion. *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 26 Cal.3d 86, 100, 160 Cal.Rptr. 733, 740, 603 P.2d 1329, 1336 (1979), cert. denied, 449 U.S. 820, 101 S.Ct. 77, 66 L.Ed.2d 22 (1980); *Owen v. City of Atlanta*, 157 Ga.App. 354, 277 S.E.2d 338, affirmed, 248 Ga. 299, 282 S.E.2d 906 (1981); *Krueger v. Mitchell*, 112 Wis.2d 88, 101, 332 N.W.2d 733, 739 (1983); *Baker v. Burbank-Glendale-Pasadena Airport Authority*, 39 Cal.3d 862, 218 Cal.Rptr. 293, 705 P.2d 866 (1985); *Ursin v. New Orleans Aviation Board*, 506 So.2d 947, 955 (La.App. 5th Cir.1987).[5] The Solicitor General, in a brief filed at the Supreme Court's invitation in *Greater Westchester*, informed the Court that *Luedtke* had been decided incorrectly but that because *Luedtke* stood alone the conflict did not require resolution.

We must decide whether to maintain a go-it-alone position. Three things persuade us that *Luedtke* is incorrect and that we should fess up to the error.

1. Preemption of state law depends on either a comprehensive federal regimen ("occupation of the field"), usually established by express statutory declaration, or a clash between state and federal norms (a fight that the federal rules win under the Supremacy Clause). *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984). See also, e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698-99, 104 S.Ct. 2694,

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5. *Bryski v. City of Chicago*, 148 Ill.App.3d 556, 101 Ill.Dec. 795, 499 N.E.2d 162 (2d Dist.1986), finds state claims preempted on the authority of *Luedtke*.

2699-2700, 81 L.Ed.2d 580 (1984) (collecting cases); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986); *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987). The Federal Aviation Act does not expressly preempt state damages remedies. To the contrary, § 1106 of the Federal Aviation Act, 49 U.S.C.App. § 1506, provides that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." *Luedtke* did not mention this anti-preemption statute. Statutes of this sort save common law remedies even when federal law exclusively determines the content of substantive rules. *International Paper Co. v. Ouellette*, 479 U.S. 481, 497-98, 107 S.Ct. 805, 814-15, 93 L.Ed.2d 883 (1987); *Brown v. Hotel & Restaurant Employees*, 468 U.S. 491, 505-07 104 S.Ct. 3179, 3187-88, 82 L.Ed.2d 373 (1984). Section 1106 is no exception. *Nader v. Allegheny Airlines, Inc.*, 426 U.S 290, 298-300, 96 S.Ct. 1978, 1984-85, 48 L.Ed.2d 643 (1976), holds that § 1106 preserves against preemption a claim for fraudulent misrepresentation in selling tickets for air travel. State courts award compensation for takings in inverse condemnation cases, although if there is complete federal preemption the national rather than the local government should be the payor. State courts award damages every day in air crash cases, notwithstanding that federal law preempts the regulation of safety in air travel. If damages are available for takings, and common law remedies are available on questions of fraud and safety, why not on questions of noise and chemical emissions?

2. *Burbank*, on which we relied in *Luedtke*, was a different kind of problem altogether. The City of Burbank had enacted a curfew, forbidding departures of jet aircraft from a privately-owned airport between 11 p.m. and 7 a.m. This directly regulated the airport's operations, interfering with the Federal Aviation Administration's contrary judgment. The Supreme Court distinguished in *Burbank* between the state's role as a regulator and its role as a proprietor of airports, observing that it was not questioning the ability of a governmental body to determine how it would run its own airports. 411 U.S. at 635-36 & n. 14, 93 S.Ct. at 1860-61 & n. 14. It stepped back from this issue because both reports on the statute establishing federal noise rules stated expressly that local governments could set their own standards as proprietors. See H.R.Rep. 92-842, 92d Cong., 2d Sess. 8-10 (1972); S.Rep. 92-1160, 92d Cong., 2d Sess. 10-11 (1972), U.S. Code Cong. & Admin.News 1972, p. 4655.

So Illinois has some role notwithstanding *Burbank* in governing the amount of noise and pollution that escapes from O'Hare. We need not and do not say just what the role is, although other courts have read *Burbank* as allowing a state to exclude certain kinds of aircraft in order to reduce noise. E.g., *British Airways Board v. Port Authority of New York*, 558 F.2d 75 (2d Cir.1977) (exclusion of Concorde). Illinois might choose to exercise such powers as it has through the City of Chicago, the "owner" of O'Hare. It might withdraw home rule from Chicago and exercise these powers through legislation of general application. Or it might exercise these powers through the courts. Neither the Constitution nor the Federal Aviation Act, as amended by the Noise Control Act of 1972, determines

how Illinois apportions its governmental powers. *Whalen v. United States*, 445 U.S. 684, 689 n. 4, 100 S.Ct. 1432, 1436 n. 4, 63 L.Ed.2d 715 (1980); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 n. 13, 94 S.Ct. 1323, 1330 n. 13, 39 L.Ed.2d 630 (1974); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612, 57 S.Ct. 549, 551, 81 L.Ed. 835 (1937); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 225, 29 S.Ct. 67, 69, 53 L.Ed. 150 (1908); *Dreyer v. Illinois*, 187 U.S. 71, 83-84, 23 S.Ct. 28, 32, 47 L.Ed. 79 (1902); *United Beverage Co. v. Indiana Alcoholic Beverage Comm'n*, 760 F.2d 155 (7th Cir.1985). Whether Illinois should allow its courts some role in setting noise levels at O'Hare is the state's business. The federal role is limited to defining the powers of the state as an entity. Given the recognition in *Burbank* that the state may govern the operation of airports it owns, the conclusion in *Luedtke* that every conceivable role for state courts has been preempted is untenable.

3. *Burbank* dealt with regulation: the city enacted a substantive rule. Bieneman wants damage, not regulation. Perhaps this is a distinction without a difference. An award of damages is compensatory from Bieneman's perspective, but from O'Hare's it is no different from regulation. The airport and the air carriers see the award of damages as a signal to stop doing whatever led to the decision, just as the monetary penalty for violating an express substantive rule would lead them to desist. Damages for disobeying an acknowledged rule discourage that disobedience and also induce potential defendants to steer clear of the danger zone, to discontinue conduct that in fact complies with the rule but could be mistaken for noncompliance. It is hard (and costly) to determine

facts, and the errors inevitable in litigation may discourage beneficial conduct. So too, excessive awards might discourage conduct that is questionable under existing rules but beneficial on balance (and therefore goes unchallenged by the agency with control of the substantive doctrines).

The identity of common law damages and penalties for disobedience to substantive rules could lead to a conclusion that where a state is forbidden to alter the substantive rule it is forbidden to award damages. *Silkwood v. Kerr-McGee* rejects this equation, however. The Court held in *Pacific Gas & Electric Co. v. State Energy Conservation & Development Comm'n*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), that federal law occupies the field of nuclear safety regulation. Notwithstanding the argument (indeed the truism) that an award of hefty compensatory and punitive damages is a method of regulating safety, the Court concluded that federal law does not preempt common law remedies concerning nuclear safety. "*Silkwood* . . . highlights the extreme reluctance of the modern Court to find preemption." Ronald D. Rotunda, *Sheathing the Sword of Federal Preemption*, 5 Constitutional Commentary 311, 317 (1988). If no preemption is the conclusion notwithstanding the absence from nuclear safety legislation of a statute such as § 1106, it must be the appropriate treatment of air travel as well.

Luedtke did not mention any of these considerations, and its holding cannot be maintained in the face of them. We overrule *Luedtke* to the extent it holds that all common

law remedies for airport noise and pollution have been preempted by federal law.[6]

A word on what this means. Bieneman wants common law remedies, but these must be remedies for *wrongs*, as in *Silkwood*, or for those aspects of airport operation within the state's control as proprietor under *Burbank*. Federal law governs much of the conduct of O'Hare and its carriers. See 14 C.F.R. Part 36 (noise characteristics of aircraft), Part 150 (noise abatement procedures at airports). A state court could not award damages against O'Hare or its users for conduct required by these regulations, or for not engaging in noise abatement procedures that the Federal Aviation Admistration considered but rejected as unsafe. Bieneman's complaint suggests that damages should be awarded because there are too many flights per hour, or because the aircraft are older models not fitted with high-bypass turbofan engines, or because the planes do not climb at a sufficiently steep rate after takeoff. These subjects are governed by federal law, and a state may not use common law procedures to question federal decisions or extract money from those who abide by them. There may be, on the other hand, aspects of O'Hare's operations that offend federal law, or that federal norms do not govern. Perhaps, as Bieneman insists, the airport does not use adequate noise baffles around the perimeter of the airport, or perhaps it has built more runways than federal

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6. Because this opinion overrules a portion of the decision in *Luedtke*, it was circulated to all judges in regular active service under Circuit Rule 40(f). No judge requested that the case be heard en banc.

law requires (to the detriment of those under the new ones), or is out of compliance with the governing federal rules. The essential point is that the state may employ damages remedies only to enforce federal requirements (as in *Silkwook*) or to regulate aspects of airport operation over which the state has discretionary authority.

This disposes of the federal defense to the claims under state law. Remaining questions about the common law of Illinois are more appropriately resolved in state court, since no ground of federal jurisdiction survives. We therefore affirm the district court's judgment to the extent it rejects all of Bieneman's claims under the Constitution, vacate the judgment to the extent it holds that claims under state law are preempted, and remand with directions that the court relinquish jurisdiction under *Gibbs*, so that Bieneman may pursue his state-law contentions in state court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE BIENEMAN, on his own behalf and on behalf of all persons similarly situated, Plaintiffs, v. THE CITY OF CHICAGO, et al., Defendants.	)	No. 84 C 10388
DELBERT BIDDISON, on his own behalf and on behalf of all persons similarly situated, Plaintiffs, v. THE CITY OF CHICAGO, et al., Defendants.	)	No. 85 C 10295

MEMORANDUM OPINION

Lawrence Bieneman and Delbert Biddison own homes near O'Hare International Airport and claim various injuries from the noise, vibrations, and air pollution that O'Hare inflicts on its neighbors. Each has sued the City of Chicago – which owns and operates O'Hare – and several airlines, seeking relief both on his own behalf and on behalf of "all persons who own, use or reside in residential real property situated in Illinois within the territorial boundaries of Cook County and DuPage County, under or adjacent to the paths of aircraft approaching, departing or circling O'Hare International Airport." *Bieneman v. City of Chicago*, No. 84 C 10388;

Biddison v. City of Chicago, No. 85 C 10295. The two cases have been found related, and come before the court today on defendants' motions to dismiss.[1]

Bieneman's and Biddison's eight-count First Amended Complaints are nearly identical, and name as defendants the City, Harold Washington in his official capacity as Mayor of the City of Chicago, Jerome Butler in his official capacity as acting Commissioner of the Department of Aviation of the City of Chicago (collectively, "the City defendants"), and seven companies providing air passenger service at O'Hare: American Airlines, Inc.; Delta Airlines, Inc.; Northwest Airlines, Inc.; Ozark Airlines, Inc.; Trans World Airlines, Inc.; United Air Lines, Inc.; and USAirlines, Inc. (collectively, "the airline defendants").

Court I of each First Amended Complaint accuses the City defendants of maintaining an official policy that has

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1. Rule 23(c)(1) of the Federal Rules of Civil Procedure provides that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Although the Seventh Circuit has emphasized the importance of compliance with this requirement, *see, e.g., Glidden v. Chromalloy American Corp.*, 808 F.2d 621 (7th Cir. 1986), no party in either *Bieneman* or *Biddison* has sought a determination of whether it is appropriate to maintain these cases as class actions. It appears likely from the face of the complaints that class action status is appropriate, but the court declines to make such a determination without the participation of counsel. Presumably some party will raise the issue in the near future. Since the status of these cases as class actions is irrelevant to the motions before the court today, the court proceeds to address the merits of those motions.

deprived plaintiffs of their Fourteenth Amendment rights to life, liberty, and property in violation of 42 U.S.C. § 1983. Count II accuses the airline defendants of acting under color of state law as co-conspirators with the City to deprive plaintiffs of their Fourteenth Amendment rights in violation of § 1983. Count III is an inverse condemnation claim against the City.

Count IV alleges that the City's operation of O'Hare constitutes a continuing nuisance. Count V is a claim against the City for assault and battery. Count VI alleges that the airline defendants are joint venturers with the City in the operation of O'Hare and therefore are liable together with the City for the injuries alleged in Counts III-V. Count VII seeks a declaratory judgment that federal law does not preempt plaintiffs' state law tort claims against the City. Finally, Count VIII alleges that the City violated plaintiffs' Fourteenth Amendment rights by taking their property without due process.

The City defendants have moved to dismiss Counts I, III, IV, V, VII, and VIII in *Bieneman*, and Counts I, IV, V, VII, and VIII in *Biddison*. In *Biddison* the City defendants have also filed a motion for summary judgment on Count III, but the court has suspended briefing on that motion pending additional discovery. The airline defendants have moved to dismiss Count VI in both *Bieneman* and *Biddison*. Because the parties have consolidated briefing in the *Bieneman* and *Biddison* cases, the court now has before it a single set of briefs addressing the merits of Counts I, III, IV, V, VII, and VIII of the First Amended Complaints, and a single set of briefs addressing the merits of Count VI of those complaints. The court examines each count in turn.

Counts I and II

Counts I and II of the First Amended Complaints restate claims that Judge Decker dismissed from Bieneman's original complaint on October 23, 1985. This court declined to reconsider Judge Decker's order and made it applicable to the *Biddison* case. Plaintiffs say they have repleaded Counts I and II in order to preserve their right to appeal Judge Decker's dismissal of those counts. *See London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981) (plaintiff waives all claims alleged in the original complaint which are not reasserted in the amended complaint); *contra Wilson v. First Houston Investment Corp.*, 566 F.2d 1235, 1238 (5th Cir. 1978) (plaintiff who filed amended complaint after dismissal may raise on appeal the correctness of the dismissal order). It is not for this court to decide whether plaintiffs who file amended complaints must replead dismissed claims in order to preserve those claims for appeal; in this case plaintiffs have chosen to replead the dismissed claims, and Judge Decker's ruling remains the law of the case. Counts I and II are dismissed.

Count III

Count III of Bieneman's complaint alleges that "in 1976 Defendant City of Chicago destroyed the use and enjoyment of Plaintiffs' properties, damaged and destroyed Plaintiffs' airspace, dwellings, and other structures on Plaintiffs' properties, and totally destroyed the value of Plaintiffs' property as residences." By virtue of this conduct, Bieneman continues, "Plaintiffs' properties and airspace, and each of them, have been confiscated,

condemned, taken and made useless by Defendant City of Chicago without due process and without compensation in violation of the Fourteenth Amendment to the Constitution of the United States." The City moves to dismiss Count III on the ground that it fails to state a claim under the Fourteenth Amendment, and in any event is barred by the statute of limitations.

Unlike Bieneman's other federal claims – Counts I and II, which allege violations of § 1983 – Count III alleges only a violation of the Fourteenth Amendment. There is strong authority that the Fourteenth Amendment does not support a direct cause of action against a municipality when the municipality is subject to suit under § 1983.

The Supreme Court did imply a cause of action arising directly under the Constitution in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), where the Court held that victims of constitutional violations by federal agents may sue the agents despite the absence of a statutory cause of action. But the Court subsequently held that such a cause of action is not available when "Congress has provided an alternative remedy which is explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (emphasis in original). Lower courts subsequently have expressed considerable reluctance to expand the number of direct actions allowed under the Constitution absent explicit Supreme Court approval, reading *Carlson* to limit the availability of such causes of action to circumstances where no alternative statutory remedy exists. *See,*

e.g., Morris v. Washington Metropolitan Area Transit Authority, 702 F.2d 1037, 1042 n. 10 (D.C. Cir. 1983).

Since the Supreme Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), it has been clear that § 1983 provides a cause of action against municipalities and municipal employees acting in their official capacities, and courts accordingly have declined to allow direct constitutional claims against local governments. As one court in this district has concluded, "Congress intended § 1983 to be the exclusive federal remedy for the unconstitutional actions of city officials." *Strauss v. City of Chicago*, 614 F.2d 9, 10 (N.D. Ill. 1984), *aff'd* 760 F.2d 765 (7th Cir. 1985). *Accord Williams v. Bennett*, 689 F.2d 1370, 1390 (11th Cir. 1982); *Ward v. Caulk*, 650 F.2d 1144, 1147-48 (9th Cir. 1981). Indeed, the D.C. Circuit noted in *Morris* that since the Supreme Court's *Monell* decision every court of appeals to address the issue has concluded that no direct cause of action exists under the Fourteenth Amendment against nonfederal defendants. 702 F.2d at 1042 n. 10. In view of the many decisions rejecting direct causes of action under the Constitution when statutory remedies are available, and in view of the fact that the Supreme Court has recognized a cause of action against a municipality under § 1983 for inverse condemnation, *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 399-400 (1979), this court concludes that Bieneman does not have a direct cause of action against the City under the Fourteenth Amendment.

Only one recent case provides contrary authority, holding in a footnote that "[b]ecause an alleged 'taking' in violation of the fifth and fourteenth amendments presents a serious constitutional question, a direct cause of

action lies within the district court's federal question jurisdiction." *Amen v. City of Dearborn*, 718 F.2d 789, 792 n. 4 (6th Cir. 1983). But *Amen* cites as its only authority two pre-*Monell* cases, *Gordon v. City of Warren*, 579 F.2d 386, 391 (6th Cir. 1978), and *Muskegon Theaters, Inc. v. City of Muskegon*, 507 F.2d 199, 200 (6th Cir. 1974), which allowed direct Fourteenth Amendment inverse condemnation actions against municipalities on the ground that no remedy was available under § 1983. In light of *Monell* and *Lake Country Estates*, such reasoning is no longer valid.

Bieneman cannot save Count III by amending it to allege a violation of his rights under § 1983. "[I]n Illinois, a plaintiff whose section 1983 cause of action accrued before the [Supreme Court's decision in *Wilson v. Garcia*, 105 S.Ct. 1938 (1985)], must file suit within the shorter period of either five years from the date his action accrued or two years after *Wilson*." *Anton v. Lehpalmer*, 787 F.2d 1141 (7th Cir. 1986). Because Bieneman's cause of action under § 1983 arose in 1976, more than five years before he brought this suit, the statute of limitations bars his claim. Count III of Bieneman's complaint is dismissed.

Counts IV and V

The City raises two arguments against Counts IV and V, which allege the torts of nuisance and assault and battery: first, that federal law preempts state tort claims against airport proprietors; and second, that Illinois courts have not recognized a cause of action against the proprietor of a transportation facility for the lawful, non-negligent operation of that facility.

As the City points out, *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975) is a formidable obstacle to plaintiffs' tort claims. In *Luedtke* the Seventh Circuit held that federal law preempts state negligence and nuisance actions against airport proprietors and airlines so long as the airports and airlines are operating consistently with federal laws and regulations. 521 F.2d at 391. *Accord*, *Bryski v. City of Chicago*, 148 Ill. App. 3d 556, 564 (2nd Dist. 1986).

Plaintiffs acknowledge *Luedtke*, but argue that it is no longer good law in light of the Supreme Court's decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). *Silkwood* holds that federal regulation of the safety aspects of nuclear energy does not preempt a state law action for punitive damages for the release of plutonium from a federally licensed facility. 464 U.S. at 258. The Court based its conclusion on extensive evidence that Congress intended to retain state tort remedies for nuclear injuries when it enacted laws regulating nuclear safety, and on its determination that the existence of state remedies would neither frustrate the objectives of federal law nor create an irreconcilable conflict between state and federal standards. *Id.* at 256.

Nothing in *Silkwood* suggests that the Seventh Circuit erred in *Luedtke* when it held that federal regulation of air transportation preempts state tort actions against airport proprietors and airlines complying with federal law. Neither *Luedtke* nor the Supreme Court decision on which *Luedtke* relied, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (pervasive nature of scheme of federal regulation of aircraft noise preempts local ordinance limiting hours of take-offs by jet aircraft), finds any

evidence of Congressional intent to allow state regulation of airport operations. Indeed, *City of Burbank* recites substantial evidence that Congress did intend to preempt local regulation of airport noise. 411 U.S. at 633-39. *Silkwood's* conclusion that federal law does not preempt state tort actions in the area of nuclear safety does nothing to undermine *Luedtke's* conclusion that federal law preempts such claims in the unique and entirely unrelated field of air transportation.

Because *Luedtke* remains good law in the Seventh Circuit, this court must follow it. Counts IV and V are dismissed because they assert state tort claims preempted by federal law. It is unnecessary to address the City's alternative argument for the dismissal of Counts IV and V.

Count VI

Count VI alleges that the airline defendants are joint venturers with the City in the operation of O'Hare, and thus are liable together with the City for the inverse condemnation alleged in Count III, and for the common law torts alleged in Counts IV and V.

As the court has already concluded, federal law preempts plaintiffs' state tort claims. *Luedtke v. County of Milwaukee,* 521 F.2d at 391. *Luedtke* and *Griggs v. Allegheny County,* 369 U.S. 84, 89 (1962) foreclose plaintiffs' inverse condemnation claim against the airlines; both cases squarely hold that airlines may not be held liable for the taking of property adjacent to airports from which the airlines operate flights. Count VI is dismissed.

Count VII

In Count VII plaintiffs request a declaratory judgment that federal law does not preempt their state tort claims against the City. Count VII is superfluous and an inappropriate invocation of the district court's power to grant declaratory relief. If plaintiffs' state tort claims survive a motion to dismiss there is no need for a declaration that federal law does not preempt them; on the other hand, if the court dismisses the state tort claims on the basis of preemption a request for a declaratory judgment of non-preemption can fare no better. Count VII is dismissed for the same reasons as Counts IV and V.

Count VIII

Count VIII alleges that the City violated plaintiffs' Fourteenth Amendment right to due process by acquiring interests in their property without notice or a hearing. This adds nothing to the allegations of Count III. Assuming plaintiffs can show that the City did actually "take" their property, it is settled law that a governmental body may take land without notice or a hearing, leaving the landowner with an action for inverse condemnation as his sole remedy. *United States v. Clarke*, 445 U.S. 253, 256-57 and n. 3 (1980); *Barbian v. Panagis*, 694 F.2d 476, 482 n. 6 (7th Cir. 1982). Count III asserts such a claim, so Count VIII is redundant. Count VIII is dismissed.

CONCLUSION

Counts I, II, IV, V, VI, VII, and VIII of *Bieneman v. City of Chicago*, No. 84 C 10388, and *Biddison v. City of Chicago*,

No. 85 C 10295, are dismissed. Count III of *Bieneman* also is dismissed.

ENTER:

/s/ Brian Barnett Duff
BRIAN BARNETT DUFF, JUDGE
UNITED STATES DISTRICT COURT

DATE: June 8, 1987

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE C. BIENEMAN, Plaintiff,	)	
-vs-	)	NO. 84 C 10388
THE CITY OF CHICAGO, et al., Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, Lawrence Bieneman (Bieneman), owns real property near O'Hare Airport (O'Hare). He claims the noise, vibration and pollution incident to the operation of O'Hare violate his constitutional rights. Therefore, he brought this class action under 42 U.S.C. § 1983 against the City of Chicago (the "City"), certain city officials, and various airlines (the "Airlines"). First, plaintiff alleges that, by its operation of O'Hare, the City intentionally deprived him of his Fourteenth Amendment rights (Count I). Next, plaintiff claims the Airlines conspired together and with the City to operate O'Hare in a manner violative of those rights (Count II). Finally, plaintiff alleges the City's operation of O'Hare constitutes a taking of his property without compensation in violation of the Fourteenth Amendment (Count III). Plaintiff seeks damages and injunctive relief.

The City moves to dismiss Count I for failure to state a claim.[1] It also seeks dismissal of Count III for failure to

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1. In considering a motion to dismiss, the court must "take [plaintiff's] allegations to be true, and view them, together

(Continued on following page)

join a necessary and indispensable party under Fed. R. Civ. P. 12(b)(7) and 19(b), or in the alternative, for a more definite statement of Count III. The Airlines move to dismiss Count II for lack of subject matter jurisdiction and failure to state a claim.

I. *Discussion*

1. *Count I*

Plaintiff complains that the City's operation of O'Hare results in a high volume of noise, vibration and air pollution harming residents of the surrounding community and their property. This may be, but plaintiff must identify a Fourteenth Amendment liberty or property interest violated by such activities to state a cause of action under § 1983. *Jackson v. Byrne*, 738 F.2d 1443, 1445-1446 (7th Cir. 1984). It is well settled that liberty and property interests arise from state law and the Due Process Clause itself. *Hewitt v. Helms*, 459 U.S. 460, 466 (1983).

Plaintiff rightly admits there is no constitutional right to protection from general environmental harms. Plaintiff argure, However, that this case "should be treated . . . [as

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(Continued from previous page)

with reasonable inferences to be drawn therefrom, in the light most favorable to the plaintiff." *Powe v. City of Chicago*, 664 F.2d 639, 642 (7th Cir. 1981). Dismissal for failure to state a claim is proper only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

one] involving official policies that result in the intentional beating of citizens with fists and clubs." Plaintiff's Memorandum at 18. In essence, plaintiff alleges the noise, vibration and pollution at O'Hare constitute an assault and battery. Plaintiff, however, cites no case adopting this novel theory.[2] The court finds plaintiff's analogy between fists and club and airplane noise wholly inappropriate. Plaintiff's claim is better analogized to common law nuisance and the Seventh Circuit has expressly held that such tort rights "are not property rights under the Fourteenth Amendment." *Brown v. Brienan*, 722 F.2d 360, 364 (7th Cir. 1983). Plaintiff's analogy also stretches the scope of the Fourteenth Amendment and § 1983 beyond plausible limits. If noise from a lawfully operated airport is actionable under § 1983, so too are other normal government operations; i.e., bus and train systems, construction projects. Neither the Fourteenth Amendment nor § 1983 was intended to mandate such a result. Cf. *Jackson v. City of Joliet*, 715 F.2d 1200, 1205 (7th Cir. 1983), *cert, denied* 104 S.Ct. 1325 (1984). Because plaintiff does not sufficiently

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2. Plaintiff contends that the factually similar case of *Virginians for Dulles v. Volpe*, 344 F. Supp. 573 (E.D. Va. 1972), *aff'd in part, rev'd in part on other grounds*, 541 F.2d 442 (4th Cir. 1976), recognized such a claim. The court disagrees. In *Virginians for Dulles*, the court characterized the plaintiffs' due process claim as one based on nuisance. The court, in dicta, entertained the relevance of specific personal injury. Plaintiff interprets this to mean that a due process claim can be based on personal injury caused by airplane noise. The court's discussion, however, occurs in the context of its consideration of the nuisance claim and is relevant only thereto. The Fourth Circuit so interpreted the court's ruling on appeal. *Virginians for Dulles*, 541 F.2d 442, 443-444 (4th Cir. 1976).

allege violation of his Fourteenth Amendment rights, Count I cannot survive.

2. *Count II*

Count II alleges a conspiracy among the Airlines and the City. Plaintiff's Fourteenth Amendment claim is based on the same faulty analogy rejected above. It is axiomatic that there can be no conspiracy to do that which is legal. Therefore, because plaintiff does not sufficiently allege violation of his Fourteenth Amendment rights, his conspiracy claim lacks an essential element and must be dismissed.[3]

3. *Count III*

A. *Motion to Dismiss*

It is undisputed that plaintiff pleads a valid cause of action for the alleged taking of his property without compensation. *Griggs v. Allegheny County*, 369 U.S. 84, 88 (1962). The issue raised by defendant's motion is whether the United States must be joined as a party to this action. In *Griggs*, the Supreme Court held that the Airport "promoter, owner and lessor" (the "proprietor") was liable for taking an air easement. Plaintiff argues that the City is the sole proprietor of O'Hare and the only necessary party to this action. The City contends, however, that by

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3. The court also notes that, even if properly pleaded, no such cause of action may be asserted against the Airline defendants. The Seventh Circuit so held in *Luedtke v. County of Milwaukee*, 521 F.2d 387, 389 (7th Cir. 1975).

its independent control over certain land and operations at O'Hare, the United States is a co-proprietor and as such must be joined in this action. Defendants rightly point out that the court has no jurisdiction over the United States in this case because the United States can only be sued for inverse condemnation in the United States Claims Court where, as here, the claim exceeds ten thousand dollars. 28 U.S.C. §§ 1346(a), 1491. Therefore, if the United States is a necessary party, the court must determine whether this action should, in equity and good conscience, proceed without the United States. Fed. R. Civ.P. 19(b).

The court must decide whether the United States is a proprietor of O'Hare. Criteria relevant to this determination are ownership, operation, promotion and the ability to acquire necessary easements. *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306, 1317 (9th Cir. 1981), *cert. denied* 455 U.S. 1000 (1982).

The United States originally selected the site and owned the land on which O'Hare is now situated. Through a series of conveyances, it has transferred most of that land to the City. The United States retained a variety of controls over the land and operations at O'Hare as a condition of these conveyances. In particular, the City was obligated to, 1) use the land for airport purposes; 2) deny an exclusive right of use to any third party; 3) maintain the land and improvements in good condition; and 4) prevent the development of navigation hazards. In deeds executed in 1946 and 1972, the United States retained reversionary rights which vest if these conditions are not satisfied. *See* Exhibits "B-1," "B-7," and "B-8" to Defendant's Memorandum. Furthermore, the

United States has title to a small portion of land at O'Hare which it uses independently for maintenance and operation of its military aircraft.

Considering these and defendant's other arguments, the court is not convinced that the United States is a proprietor of O'Hare. The conditions set out in the deeds cited above implicitly assume that the City operates O'Hare. These conditions can be satisfied only by O'Hare's operator. The reversions constitute a remote interest in certain land at O'Hare, but do not evidence any active operation thereof.[4]

The United States' flights out of O'Hare constitute less than one percent of the airport's total flights. *See* Exhibit "4" to Plaintiff's Memorandum. Furthermore, the United States' independent operations at O'Hare are not at issue in this case. Plaintiff's complaint attacks only the City's operations at O'Hare. The City has no control over the United States' operations and therefore cannot be responsible for an easement created thereby.

The court is also mindful that in numerous documents, including O'Hare's operating license and a City ordinance authorizing revenue bonds for O'Hare construction, the City is listed as the sole operator of O'Hare. *See* Exhibits "2F," and "3" to Plaintiff's Memorandum. These and other documents indicate that the United

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4. The reversions may vest only upon violation of the aforementioned conditions. These conditions, however, are not implicated in this action. Therefore, there is little likelihood that the United States' interest in O'Hare will become more immediate and important as a result of this litigation.

States plays no active role in the proprietary operation of O'Hare. *See generally* Exhibits to Plaintiff's Memorandum. In sum, the court finds that the City is the sole proprietor of O'Hare and the only necessary party to this action. *Accord Illinois ex rel. Scott v. Butterfield*, 396 F. Supp. 632, 645 (N.D. Ill. 1975).

Alternatively, the court is convinced that even if the United States is a necessary party, equity and good conscience dictate that this action proceed without it. The factors considered by the court in this regard include, 1) the extent to which a judgment rendered in the absence of the United States might prejudice the United States or the City; 2) the extent to which that prejudice can be minimized by shaping the appropriate relief; 3) whether the relief so shaped is adequate; and 4) whether plaintiff has another available forum. Fed. R. Civ. P. 19(b).

Of greatest import is the lack of another available forum. Defendant admits that it cannot be joined by plaintiff as a matter of right in the United States Claims Court. Further, because the United States operates relatively few flights out of O'Hare, the court is confident that adequate relief can be fashioned in its absence and the practical likelihood of multiple proceedings is low. In addition, there is little possibility that proceeding will prejudice the City or the United States. Any such prejudice is outweighed by the aforementioned counterveiling factors.

B. Motion for More Definite Statement

The court finds merit in defendant's motion for a more definite statement of the time at which the alleged

taking occurred. Under plaintiff's theory of liability, at some point in time, the operations at O'Hare so burdened his property as to constitute a partial taking thereof. For plaintiff to recover compensation from the City for this easement, he must show that he held title to the property at the time the easement was created. Therefore, plaintiff must allege in his complaint the time he took title to the property and the approximate time the easement was created. *See Branning v. United States*, 654 F.2d 88, 102-103 (Ct. Cl. 1981).

II. *Conclusion*

For the foregoing reasons, defendants' motions to dismiss Counts I and II of the complaint are granted. The City's motion to dismiss Count III is denied. The court grants the City's motion for a more definite statement.

ENTER:

/s/ Bernard M. Decker
United States District Judge

DATED: October 23, 1985

Supreme Court, U.S.
FILED
APR 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1496

In The
Supreme Court of the United States
October Term, 1988

THE CITY OF CHICAGO; EUGENE SAWYER, in his official capacity as Acting Mayor of the City of Chicago; HOWARD STANBACK, in his official capacity as Commissioner of the Department of Aviation of the City of Chicago; AMERICAN AIRLINES, INC.; DELTA AIRLINES, INC.; NORTHWEST AIRLINES, INC.; OZARK AIRLINES, INC.; TRANS WORLD AIRLINES, INC.; UNITED AIR LINES, INC.; and USAIRLINES, INC.,

Petitioners,

v.

LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE CITY OF CHICAGO; EUGENE SAWYER, in his official capacity as Acting Mayor of the City of Chicago; HOWARD STANBACK, in his official capacity as Commissioner of the Department of Aviation of the City of Chicago; AMERICAN AIRLINES, INC.; DELTA AIRLINES, INC.; NORTHWEST AIRLINES, INC.; OZARK AIRLINES, INC.; TRANS WORLD AIRLINES, INC.; UNITED AIR LINES, INC.; and USAIRLINES, INC.,

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REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW BROUGHT THE SEVENTH CIRCUIT INTO CONFORMANCE WITH THE OVERWHELMING WEIGHT OF AUTHORITY WHICH HAS FOUND NO CLEAR AND MANIFEST INTENT BY CONGRESS TO PREEMPT STATE LAW DAMAGE REMEDIES FOR INJURIES CAUSED BY AIRPORT NOISE.

Contrary to the position taken by the City of Chicago, the decision rendered below by the Seventh Circuit was hardly novel. Every branch of government—from the FAA, to the Solicitor General, Congress, the lower federal courts, the state supreme courts, and even other airport operators—has consistently recognized that airport operators are subject to liability under state law damage remedies for noise caused by their airport operations and that such state damage remedies are not preempted by federal law.[1] And every branch of government has recognized the concomitant authority of airport operators to reduce or minimize their liability by controlling the noise generated by airport operations.

Standing alone against this overwhelming authority was the 1975 opinion of the Seventh Circuit in *Luedtke v.*

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[1] Indeed, this Court has thrice denied certiorari on questions virtually identical to those raised by Chicago. *Greater Westchester Homeowners Association v. City of Los Angeles*, 26 Cal.3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329 (1979), *cert. denied*, 449 U.S. 820 (1980); *City of Atlanta v. Owen*, 248 Ga. 299, 282 S.E.2d 906 (1981), *cert. denied*, 456 U.S. 972 (1982); *Baker v. Burbank-Glendale-Pasadena Airport Authority*, 39 Cal.3d 862, 218 Cal. Rptr. 293, 705 P.2d 866 (1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1200 (1986).

County of Milwaukee, 521 F.2d 387 (7th Cir. 1975). Recognizing that every court other than *Luedtke* that had addressed the issue of whether Congress has preempted state law damage remedies for airport noise had found no preemption (App. 17),[2] the Seventh Circuit below asked itself whether it should continue in its "go-it-alone position" or "fess up to the error". (App. 17).

After a detailed analysis of the principles governing preemption, the Seventh Circuit overruled *Luedtke* and brought the law of the Seventh Circuit into conformity with that of other jurisdictions that have addressed the issue: Congress has not preempted state law damage remedies against airport operators for noise injuries caused by airport operations. Given the overwhelming structural and evidentiary support for this position—including the consistent and repeated refusal of this Court to overrule this position—the decision below certainly does not merit review by this Court.

A. Every Branch Of Government Has Recognized That State Law Damage Remedies Have Not Been Preempted By Congress.

With the exception of *Luedtke* (now overruled by *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988)) virtually every branch of government has explicitly recognized that state law damage remedies for airport noise have not been preempted by Congress.

---

[2] The sole case cited by Chicago for the proposition that state law damage remedies are preempted is *Bryski v. City of Chicago*, 148 Ill.App.3d 556, 101 Ill. Dec. 795, 499 N.E.2d 162 (2nd Dist. 1986). But as the Court of Appeals below noted (App. 17, n.5) *Bryski* relied on *Luedtke* as binding precedent.

1. The Congress.

The starting point in any preemption analysis is an examination of Congress' own words to see if there is any clear and manifest intent to preempt state law damage remedies. If Congress has explicitly stated its intentions with regard to preemption of state law damage remedies—either to preempt such remedies or to preserve such remedies—the Judiciary's analytical task should be at an end. It is not for the Judiciary to second guess Congress by searching for inferential intent when Congress has expressly mandated that there be no preemption.

Here Congress has clearly spoken and has affirmatively and unequivocally stated that state statutory and common law remedies are not preempted.

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.
>
> Federal Aviation Act, Section 1106, 49 U.S.C. Section 1506.

In the face of such an explicit command from Congress, it would be a usurpation of Congressional power for the Judiciary to find preemption of state law damage remedies in this case.

The logic behind Section 1106 is clear. Congress did not provide victims of tortious injuries by aircraft operations any federal remedies in the Federal Aviation Act. Thus, despite the so-called pervasive nature of federal safety regulations under the Federal Aviation Act, it is beyond dispute that victims of aircraft accidents—be they in the aircraft or on the ground—have state tort law remedies available to them. Cf. *In Re Air Crash Disaster Near Chicago, Illinois*, 644 F.2d 594 (7th Cir. 1981). Similarly, vic-

tims of aircraft noise, vibration and fuel dumping or spraying have no federal statutory remedy for their injuries under the Federal Aviation Act and Congress stated explicitly that it did not want to preempt any state law damage remedies available for injuries caused by aircraft operations.[3]

2. The Courts.

Relying on Congress' express intent to preserve state law damage remedies as well as the complete absence of any affirmative evidence that Congress intended to preempt such remedies, the courts that have addressed the issue have uniformly held that there has been no preemption of state law damage remedies. These cases involved noise damage actions against the proprietor of several of the nations' largest airports. *Greater Westchester Homeowners Association v. City of Los Angeles*, 26 Cal.3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329, 1336 (1979), *cert. denied*, 449 U.S. 820 (1980) (Los Angeles International); *Owen v. City of Atlanta*, 157 Ga.App. 354, 277 S.E.2d 338, 340 (1981), *aff'd*, *City of Atlanta v. Owen*, 248 Ga. 299, 282 S.E.2d 906 (1981), *cert. denied*, 456 U.S. 972 (1982) (Atlanta's Hartsfield International Airport); *Krueger v. Mitchell*, 112 Wis.2d 88, 332 N.W.2d 733, 740 (1983); *Ursin v. New Orleans Aviation Board*, 506 So.2d 947, 955 (La.App., 5th Cir. 1987), *rev'd on other grounds*, 515 So.2d 1087 (La. 1988) (New Orleans International Airport); *Baker v. Burbank-Glendale-Pasadena Airport Authority*, 39 Cal.3d 862,

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[3] Indeed, this Court has recognized in a related context that Congress, by Section 1106 of the Federal Aviation Act, 49 U.S.C. Section 1506, had preserved state common law tort remedies for tortious injuries by airlines. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 298 (1976).

218 Cal. Rptr. 293, 705 P.2d 866, 872 (1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1200 (1986).

3. The Executive Branch.

The holding of the California Supreme Court in *Greater Westchester*—that Congress had not manifested its intent to preempt state damage remedies—appeared to be in direct conflict with the Seventh Circuit's opinion in *Luedtke*. Citing this apparent conflict, the City of Los Angeles sought certiorari in this Court seeking to reverse *Greater Westchester*. The petition was denied.

Significantly, in an *amicus* brief the Solicitor General stated that it was the position of the United States Government (including the FAA) that there is no preemption of state damage remedies for injuries to person or property caused by aircraft operations. (See Brief of the United States as *Amicus Curiae* in *Greater Westchester*).

In responding to this Court's order asking for the views of the United States as to the validity of the *Greater Westchester* decision, the United States replied:

> In our view, the decision below [*Greater Westchester*] is plainly correct.
>
> Brief of United States as *Amicus Curiae*, p. 4.
>
> In sum, the California Supreme Court correctly ascertained the present state of federal preemption in the field of aircraft noise control.
>
> *Id.* at p. 8.

Further, the United States specifically criticized the *Luedtke* decision as an incorrect interpretation of *Burbank*:

> While the Seventh Circuit cited this Court's decision in *Burbank* in support of its holding, that court did not carefully examine *Burbank* (see 411 U.S. at 635-

> 636 n.14), and did not attempt to reconcile its disposition of the nuisance claim with its holding that under *Griggs, supra,* the landowners had a valid cause of action for inverse condemnation against the airport proprietor, *Luedtke, supra,* 521 F.2d at 391. The federal noise policy that was recognized in *Burbank, supra,* 411 U.S. at 635-636 n.14, does not allow for "local control of aircraft flights" and, to that extent, the Seventh Circuit was correct. However, that court failed to recognize the broad arsenal of powers otherwise available to the proprietors, which have been purposefully reserved to them because of their special ability to deal with local problems, *and the court failed to recognize that the misuse or failure to use such powers could result in tort liability.*
>
> Brief of United States as *Amicus Curiae,* p. 6, n.3 (emphasis added).

The United States also acknowledged that airport proprietors were liable under state law for damages for personal injuries as well as for property damage:

> Nor is it relevant that, here, the City has been held liable in tort for personal injury, whereas the more frequent claim involves a taking of property by inverse condemnation. The noises of jet aircraft landing and taking off from airports which cause *personal* injuries are the same noises that simultaneously cause takings of property. *In both cases, such noise is the responsibility of airport proprietors who have built the airport, located the runways and maintain sole responsibility for the operational decisions at those facilities.* Under this Court's ruling in *Griggs v. Allegheny County, supra, the City of Los Angeles is liable for torts as well as for takings.*
>
> *Id.* at p. 9 (emphasis added).

B. Concomitant With The Airport Proprietor's Liability, The FAA, The Courts And The Congress Have Consistently Recognized The Proprietor's Ability To Control Use Of The Airport To Control Noise.

Concomitant with the recognition that there has been no preemption of airport operator's liability, virtually every branch of government has recognized that the airport proprietor (and not the FAA) has primary authority to control the level of noise at its airport. The FAA has been very explicit that there is no preemption of the proprietor's authority. FAA controls the noise emissions from given aircraft types through its emission limitations under 14 CFR Part 36, but the airport proprietor has the authority to control the amount of noise allowed at any given airport.

> Responsibility for determining the permissible noise levels for aircraft using an airport *remains with the proprietor of that airport.* The noise limits specified in Part 36 are the technologically practicable and economically reasonable limits of aircraft noise reduction technology at the time of type of certification and *are not intended* to substitute federally determined noise levels *for those more restrictive limits determined to be necessary by individual airport proprietors* in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce.
>
> *Adoption of Noise Type Certification Standards and Procedures*, 34 FR 18355, November 18, 1969 (emphasis added).
>
> * * *
>
> [T]he FAA, in response to the Griggs decision (see above), recognizes the right of State or local public agencies, *as the proprietors of airports*, to issue nondiscriminatory restrictions with respect to the per-

> missible level of noise that can be created by aircraft using their airports.
>
> *Id.* at 18356 (emphasis added).
>
> [T]he Federal Government should not substitute its judgment for that of the airport operator in determining the service desired by the airport operator or the steps that the responsible airport operator is willing to take to obtain the service, and that the Federal Government should recognize the airport proprietor's right to issue regulations or establish requirements as to the permissible levels of noise which can be created by aircraft using the airport. . . .
>
> *Id.* at 18356.
>
> [T]he actual noise generated at a given airport in operation is not a question for type certification, *but involves the right of airport proprietors to limit the permissible levels of noise that can be created by aircraft using the airport. If further noise reduction must be achieved* at a given airport, the judicial decisions and the legislative history of Public Law 90-411 have made it clear that *this is a matter for the airport proprietor.*
>
> *Id.* at 18357 (emphasis added).

Consistent with the clear understanding that airport proprietors could restrict the use of their airports, the courts have upheld—as not preempted—a wide variety of restrictions imposed by airport proprietors on the use of their airports. These have included restrictions on the types of aircraft which may use the airport, restrictions on the number of operations at the airport, curfews, trip length restrictions and fleet mix requirements.

In *Santa Monica Airport Association v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981), the Ninth Circuit upheld local noise reduction ordinances which included: a night curfew; restrictions on low aircraft approaches on

weekends; a maximum single noise event level; a prohibition on all jets; and a fine for any jet landings or takeoffs. In upholding the ordinances, the Court stated that:

> We have held that the power of a municipal proprietor to regulate the use of its airport is not preempted by federal legislation.
>
> * * *
>
> The legislative history shows that Congress intended that municipal proprietors enact reasonable regulations to establish acceptable noise levels for airfields and their environs.
>
> * * *
>
> The reasonable inference . . . is that Congress intended to allow a municipality flexibility in fashioning its noise regulations.
>
> — 659 F.2d at 104-105.

See also Global International Airways Corp. v. Port Authority, 727 F.2d 246 (2d Cir. 1984), *on rehearing*, 731 F.2d 127 (1984) (upholding NY-NJ Port Authority restriction on volume of incoming operations by noisy aircraft); *British Airways Board v. Port Authority*, 558 F.2d 75, 84 (2d Cir. 1977); *British Airways Board v. Port Authority*, 564 F.2d 1002 (2d Cir. 1977); *Arrow Air, Inc. v. Port Authority*, 602 F.Supp. 314 (S.D.N.Y. 1985) ("Contrary to Arrow's assertion, nothing in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), casts any doubt on the authority of an airport proprietor to regulate aircraft noise," 602 F.Supp. at 318); *National Aviation v. City of Hayward*, 418 F.Supp. 417 (N.D. Cal. 1976); *Air Transportation Association of America v. Crotti*, 389 F.Supp. 58, 63 (N.D. Cal. 1975) (The three-judge court stated: "It is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport; his right to control the use of the airport is a necessary concomitant. . ." 389 F.

Supp. at 63-64); *Cf. San Diego Unified Port District v. Gianturco*, 651 F.2d 1306, 1316-1318 (9th Cir.), *cert. denied*, 455 U.S. 1000 (1981);[4] *Western Airlines, Inc. v. Port Authority*, 658 F.Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987) (affirmed 1500-mile perimeter rule by proprietor); and *Midway Airlines, Inc. v. County of Westchester*, 584 F.Supp 436 (S.D.N.Y. 1984).[5]

II. THE DECISION BELOW IS CONSISTENT WITH THE REQUIREMENTS OF THE COMMERCE CLAUSE.

Chicago suggests that payment of damages for state tort damage claims—or restrictions on the use of the airport in order to reduce noise—would be an unconstitutional burden on interstate commerce. If this preposterous argument is accepted, it would mean that all state damage remedies for tortious injuries caused by interstate truck, bus, train, and automobile traffic would also constitute an

---

[4] While striking down an attempt by the state of California to impose a curfew on San Diego's Lindbergh airport because the state was not the proprietor, the Ninth Circuit in *Gianturco* reaffirmed the right of Port District *as proprietor* of the airport to impose nighttime curfew on San Diego's airport. The Court also noted with apparent approval the award of compensation under *state tort law* theories citing *Westchester*, 651 F.2d at 1313 n. 16.

[5] Nor is their any evidence (as suggested by Chicago) that Congress, in passing the Airline Deregulation Act of 1978, intended to restrict the right of the airport proprietor to control and limit noise from aircraft operations using its airport. Indeed, Congress has explicitly reaffirmed the *proprietor's regulatory* authority in 49 U.S.C. sec. 1305(b)(1). In explaining the purpose of this section, Senator Kennedy stated that Congress did not want to interfere with the "long recognized powers of the airport operators to deal with noise and other environmental problems at the local level". *Remarks of Senator Kennedy on 49 U.S.C. Section 1305(b)(1)*, 124 Cong. Rec. 37419, October 14, 1978.

undue burden on interstate commerce. Moreover, the City conveniently failed to inform the Court that municipalities around the country have regularly imposed—for their own benefit—charges on interstate air travel, and the courts have declared that such charges are not a burden on interstate commerce. *See, e.g., Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972) (head tax on interstate travelers); *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986) (airline fuel tax). The City of Chicago did not feel it was an undue burden on interstate commerce when it imposed a tax on aviation fuel sold at O'Hare to raise millions of dollars for local revenue. *United Airlines v. City of Chicago*, 116 Ill.2d 311, 507 N.E.2d 858 (1987).

Not only are damage remedies not barred by the Commerce Clause, but proprietor-imposed noise restrictions can also be consistent with the Commerce Clause. The courts have upheld such restrictions from Commerce Clause challenges as long as they did not discriminate against interstate commerce in favor of local commerce and as long as they served a legitimate local purpose. *See, e.g., Arrow Air, Inc. v. Port Authority*, 602 F.Supp. 314, 321-322 (S.D.N.Y. 1985).

CONCLUSION

For all the foregoing reasons, Respondent Lawrence C. Bieneman respectfully requests this Court to deny Petitioner City of Chicago's Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

Respectfully submitted,

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